In the Supreme Court of the United States

OCTOBER TERM, 1972

No.

UNITED STATES OF AMERICA, PETITIONER

v.

LOUIS MANTELLO, ET AL.

UNITED STATES OF AMERICA, PETITIONER

v.

JOHN CONSTANTINE COMMINGS, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgments of the United States Court of Appeals for the District of Columbia Circuit in these three cases.[1]

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[1] This petition concerns three related cases which were treated together by the district court and the court of appeals for purpose of disposition under District of Columbia Circuit

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*) is not yet reported. The opinion of the district court (App. B, *infra*) is not yet reported.

JURISDICTION

The judgments of the court of appeals were entered on March 30, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the procedures followed within the Department of Justice, pursuant to which the Executive Assistant to the Attorney General authorized applications for wiretap orders on behalf of the Attorney General, were sufficient to comply with Title III of the Omnibus Crime Control and Safe Streets Act of 1968.

2. Whether, if these authorizations to apply for these wiretap orders were not sufficient, suppression of the evidence obtained from each wiretap so authorized is required.

3. Whether, if the procedures followed in authorizing the application for a wiretap order in one of these cases was in substantial compliance with the statute, evidence obtained as a result of that wiretap must nevertheless be suppressed (under the "fruit of the poisonous tree" doctrine) because the appli-

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Numbers 72-1519, 72-1520 and 72-1521. See Rule 23(5) of this Court's rules.

cation for that order contained information obtained from previous wiretaps, made under orders based upon applications authorized on behalf of the Attorney General by his Executive Assistant.

STATUTES INVOLVED

18 U.S.C. 2516 provides in pertinent part:

> (1) The Attorney General, or any Assistant Attorney General specially designated by the Attorney General, may authorize an application to a Federal judge of competent jurisdiction for, and such judge may grant in conformity with section 2518 of this chapter an order authorizing or approving the interception of wire or oral communications by the Federal Bureau of Investigation, or a Federal agency having responsibility for the investigation of the offense as to which the application is made, * * *

* * * * *

18 U.S.C. 2518 provides in pertinent part:

> (1) Each application for an order authorizing or approving the interception of a wire or oral communication shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such application. Each application shall include the following information:
>
> (a) the identity of the investigative or law enforcement officer making the application, and the officer authorizing the application;
>
> (b) a full and complete statement of the facts and circumstances relied upon by the applicant,

to justify his belief that an order should be issued, including (i) details as to the particular offense that has been, is being, or is about to be committed, (ii) a particular description of the nature and location of the facilities from which or the place where the communication is to be intercepted, (iii) a particular description of the type of communications sought to be intercepted, (iv) the identity of the person, if known, committing the offense and whose communications are to be intercepted;

* * * * *

(3) Upon such application the judge may enter an ex parte order, as requested or as modified, authorizing or approving interception of wire or oral communications within the territorial jurisdiction of the court in which the judge is sitting, if the judge determines on the basis of the facts submitted by the applicant that—

(a) there is probable cause for belief that an individual is committing, has committed, or is about to commit a particular offense enumerated in section 2516 of this chapter;

(b) there is probable cause for belief that particular communications concerning that offense will be obtained through such interception;

(c) normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to suceed if tried or to be too dangerous;

(d) there is probable cause for belief that the facilities from which, or the place where, the wire or oral communications are to be inter-

cepted are being used, or are about to be us
in connection with the commission of such
fense, or are leased to, listed in the name of,
commonly used by such person.

(4) Each order authorizing or approving
interception of any wire or oral communicat
shall specify—

* * * * *

(d) the identity of the agency authorized
intercept the communications, and of the
son authorizing the application; * * *

* * * * *

STATEMENT

Defendants in these cases were charged in t
indictments with conspiring to use interstate fa
ties in furtherance of an illegal gambling opera
in violation of 18 U.S.C. 1952, and with various
lated substantive offenses. The government's
dence was obtained primarily from three telepl
interceptions (and one extension) conducted pursu
to a court order issued under Title III of the O
bus Crime Control and Safe Streets Act of 1
Defendants moved to suppress the evidence so
tained, on the grounds that the authorization p
dures used by the Department of Justice to su
wiretap applications to the district court did not
form to the statutory requirements. The proce
followed by the Department of Justice in appl
for these orders is described in our petition for
tiorari in *United States* v. *Giordano*, No. 72-
this Term, certiorari granted, March 26, 1973.

first interception request of October 29, 1970, the extension request of November 13, 1970, and the third request of December 10, 1970, were reviewed and approved by the Executive Assistant to the Attorney General, Sol Lindenbaum. The second request of November 25, 1970, was personally approved by the Attorney General.

The district court, relying on *United States* v. *Robinson*, 468 F. 2d 189 (C.A. 5), concluded that the terms of 18 U.S.C. 2516(1) did not permit the Executive Assistant to the Attorney General to authorize applications for wiretap orders. As to the application approved by the Attorney General, it found that the procedure followed constituted substantial compliance with the statute, even though the Attorney General's memorandum of approval seemed to designate Assistant Attorney General Will Wilson to sign the authorization and Wilson's signature was affixed by a Deputy (App. B, *infra*, pp. 18-19). However, since the affidavit in support of this application was based almost entirely on information obtained from the wiretaps which had been sought pursuant to authorization from Mr. Lindenbaum, the district court concluded that this evidence too must be suppressed under the "fruit of the poisonous tree" doctrine. On appeal, a divided court of appeals affirmed. As to the Lindenbaum requests, the majority relied on *Giordano*, *supra*, and on *United States* v. *King* (C.A. 9), decided February 28, 1973, petition for a writ of certiorari pending, No. 72-1320. As to the evidence obtained from the wiretap for which the Attorney

General personally authorized the application, it concluded that "[t]his was clearly 'fruit of the poisonous tree'. See *Wong Sun* v. *United States*, 371 U.S 471 (1963)" (App. A, *infra*, p. 13).

REASONS FOR GRANTING THE WRIT

This is another in the series of cases pending before this Court on petitions for writs of certiorari involving issues closely related to those presented in *United States* v. *Giordano*, No. 72-1057, certiorari granted, March 26, 1973. This case follows *Giordano* and *King*,[2] but is in direct conflict with decisions of the Second Circuit in *United States* v. *Pisacano*, petition for certiorari pending, No. 71-1410 and *United States* v. *Becker*, petition for a writ of certiorari pending, No. 72-158.[3]

The first two questions—the validity of the applications authorized by the Attorney General's Executive Assistant and the necessity for suppression, if the authorizations were defective—are before this Court in *Giordano*. The third issue presented—whether the evidence obtained from the wiretap in which the Attorney General personally authorized the

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[2] It is also consistent with the Seventh Circuit's decision in *United States* v. *Roberts*, petition for a writ of certiorari being filed simultaneously with this petition.

[3] To the extent that it implicitly upholds the district court's approval of the procedures followed by the Attorney General in designating Assistant Attorney General Wilson to certify the authorization, the decision below also conflicts with the Ninth Circuit's decision in *United States* v. *Chavez*, petition for certiorari pending, No. 72-1319.

application should be suppressed under the "fruit of the poisonous tree" doctrine—is related to a question presented in *Giordano* and in *United States* v. *Roberts*, petition for a writ of certiorari being filed simultaneously with this petition.[4] In the former case, the Attorney General approved the application for an extension order after the application for the initial order was approved by his Executive Assistant; in the latter case, the Attorney General approved subsequent applications for wiretap orders which were based on information derived from wiretaps authorized by court orders resulting from applications authorized by the Executive Assistant to the Attorney General. We rely on the discussion in our petition in *Roberts* in support of our contention that the evidence obtained through a wiretap that is otherwise lawful and validly authorized should not be suppressed solely because the court order is based in part on an earlier wiretap that is found to have been improperly authorized within the Department of Justice.

CONCLUSION

Because of the explicit conflict among the circuits and the substantial practical importance of the issues, this petition for a writ of certiorari should be granted. Since one of the issues presented—the applicability of the "fruit of the poisonous tree" doctrine—involves a different facet of the problem pre-

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[4] We are furnishing a copy of our petitions in *Roberts* and *Giordano* to respondents.

sented in *Giordano*, the Court may wish to grant certiorari in this case and hear it with *Giordano*.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

HENRY E. PETERSEN,
Assistant Attorney General.

HARRIET S. SHAPIRO,
Assistant to the Solicitor General.

SIDNEY M. GLAZER,
JOHN J. ROBINSON,
Attorneys.

APRIL 1973.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 72-1519
No. 72-1520

UNITED STATES OF AMERICA, APPELLANT

v.

LOUIS MANTELLO, ET AL.

No. 72-1521

UNITED STATES OF AMERICA, APPELLANT

v.

JOHN CONSTANTINE COMMINGS, ET AL.

Appeals from the United States District Court
for the District of Columbia

Decided March 30, 1973

John J. Robinson, Attorney, Department of Justice, of the bar of the Supreme Court of Texas, *pro hac vice*, by special leave of court with whom *Harold*

H. Titus, Jr., United States Attorney and *Sidney M. Glazer*, Attorney, Department of Justice, were on the brief, for appellant. *John A. Terry* and *Stephen W. Grafman*, Assistant United States Attorneys also entered appearances for appellant.

William A. Borders, Jr., for appellee Simkins in No. 72-1520 also argued for all appellees.

Francis X. Grossi, Jr., with whom *Vincent J. Fuller* was on the brief, for appellees in No. 72-1521 also argued for all appellees.

H. Clifford Allder was on the brief for appellees, Smyrnas, Bellosi and DiNenna.

Lawrence Speiser (appointed by this Court) entered an appearance for appellee Berman and certain other appellees.

Edward Menard entered an appearance for appellee Mantello.

Before LEVENTHAL and ROBB, *Circuit Judges*, and WILLIAM J. JAMESON,* *Senior United States District Judge for the District of Montana.*

PER CURIAM: This is an interlocutory appeal by the Government from the order of the District Court, dated March 29, 1972, which granted the defendants' motion to suppress four intercepts of telephone conversations. The intercepts followed the issuance of judicial authorizations secured under the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510 et seq. However, the District Court held that the evidence received on these intercepts was inadmissible, and subject to motion to suppress, because of the failure to comply with 18 U.S.C. § 2516(1) which requires that the decision to seek a judicial "wiretap" order be authorized by "The At-

* Sitting by designation pursuant to 28 U.S.C. § 294(d).

torney General, or any Assistant Attorney General specially designated by the Attorney General . . .". We affirm.

Despite affidavits to the contrary presented to the United States District Court in support of the application for an order authorizing the intercepts, neither Attorney General Mitchell nor his "designated" deputy Will Wilson personally authorized, or indeed had any knowledge of, three of the four intercepts in question. Instead Mr. Sol Lindenbaum, Executive Assistant to the Attorney General, decided to designate Will Wilson to authorize the wiretaps, and affixed Attorney General Mitchell's signature to that designation. Subsequently, one of two different Deputy Assistant Attorney Generals, either Harold Shapiro or Henry Petersen, affixed Will Wilson's signature to the authorization.

The Government seeks to support this procedure as a "substantial" compliance with the law, urging *e.g.*, that Mr. Lindenbaum was the "alter ego" of the Attorney General. We cannot agree. The statutory language before us is clear. Only the Attorney General or an Assistant Attorney General designated by the Attorney General is permitted to make the determination of the Executive Branch that it requires intercepts, and to authorize applications to courts for intercept authority. Congress intended to limit the power to authorize the making of applications for wiretaps to these designated individuals, officials who had been nominated to high office and confirmed by the Senate for such office. The Congress deliberately limited the authority of the Attorney General to delegate this responsibility. That limitation on his authority to delegate cannot be circumvented by "alter ego" rationalization.

The legislative history and policy behind this congressional enactment have been extensively reviewed by Judge Sobeloff in United States v. Giordano, 469 F.2d 522 (4th Cir. 1972), and Judge Duniway in United States v. King (9th Cir., decided February 28, 1973). Both Circuits suppressed wiretaps on similar facts, and we adopt their results and rationale. To the extent United States v. Pisacano, 450 F.2d 259 (2d Cir. 1972), is to the contrary, we respectfully disagree.

In the case of the Comings tap, we also affirm the District Court. Although Attorney General Mitchell personally designated Will Wilson to authorize the tap, Wilson did not himself do so. The Government has not disputed that the probable cause affidavit submitted in support of the application for the tap relied almost entirely upon evidence seized in the Mantello taps which the District Court held were illegally obtained. This was clearly "fruit of the poisonous tree." *See* Wong Sun v. United States, 371 U.S. 471 (1963).

Affirmed.

Judge Jameson dissents, for the reasons stated in his dissenting opinion in United States v. King (9th Cir., decided February 28, 1973).

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA

v.

LOUIS MANTELLO, ET AL.

Criminal Nos. 335-71
336-71
337-71

MEMORANDUM AND ORDER

I

The defendants in each of the above numbered cases have moved to suppress wiretap evidence secured under order of a federal judge issued pursuant to Title 18 U.S.C. § 2518 on application purportedly authorized by the Attorney General or his delegate under Title 18 U.S.C. § 2516(1).

Involved are the following intercepts:

Intercept 1 (a) On October 29, 1970, U.S. District Judge John Pratt approved intercepts for (i) a telephone located in apartment 817, 1425 N Street, N.W., Washington, D.C. and (ii) a pay telephone located in the lobby of 1425 N Street, N.W.

(b) On November 13, 1970, Judge Pratt approved an extension of the intercept period on the two telephones noted in (a), *supra.*

Intercept 2 On November 25, 1970, U.S. District Judge Frank Kaufman approved intercepts on two telephones located in apartment 1416, 8200 Wisconsin Avenue, Bethesda, Maryland.

Intercept 3 On December 10, 1970, U.S. District Judge John Pratt approved an intercept on a telephone located at 2737 Devonshire Place, N.W., Washington, D.C.

The application for a court order was in each case presented by Donald Campbell of the Department of Justice and in each application it was recited:

> "Pursuant to the powers conferred on him by Section 2516 of Title 18, United States Code, the Attorney General of the United States, the Honorable John N. Mitchell, has specially designated in this proceeding the Assistant Attorney General for the Criminal Division of the Department of Justice, the Honorable Will Wilson, to authorize affiant to make this application for an extension of an order authorizing the interception of wire communication."

Notwithstanding the foregoing representation, the record indicates as to Intercept 1(a), *supra*, that the original authorization for such intercept was not signed or initialed by the Attorney General but by one Sol Lindenbaum, his Executive Assistant. Lindenbaum in turn addressed a memorandum to Will Wilson, the Assistant Attorney General in Charge of the Criminal Division, reciting that Wilson was "specially designated" to authorize an application to the Court for the intercept order. However, Harold Shapiro, the Deputy Assistant Attorney General in the Criminal Division, and not Will Wilson, affixed Wilson's signature to an authorization to Donald Campbell to make the application to the Court.

The same procedure was followed as to intercepts 1(b) and 3, *supra*, except that Henry Peterson, a Deputy Assistant Attorney General in the Criminal

Division, affixed Will Wilson's signature to the authorization to Donald Campbell to make application to the Court for the intercept order. In other words, the application was processed through Lindenbaum to Peterson to Campbell and neither the Attorney General nor a specially designated Assistant Attorney General ever handled the papers.

As to Intercept No. 2, *supra*, John N. Mitchell, then Attorney General, did in fact initial a memorandum to Will Wilson specially designating Wilson to exercise his powers to authorize application to the Court. However, Henry Peterson and not Will Wilson affixed Wilson's signature to the authorization to Campbell to apply to the Court for its order.

II

The defendants challenge the procedures followed in securing the authorizations to intercept, alleging that such procedures violated the provisions of Title 18, Section 2516(1) which states:

> "*The Attorney General, or any Assistant Attorney* General specially designated by the Attorney General, *may authorize an application* to a Federal judge of competent jurisdiction for, and such judge may grant in conformity with Section 2518 of this chapter an order authorizing or approving the interception of wire or oral communications by the Federal Bureau of Investigation or a Federal agency having responsibility for investigation of the offense as to which the application is made . . ." (emphasis supplied)

The government, while admitting the absence of authorization by the Attorney General or an Assist

ant Attorney General specially designated, (except for Intercept No. 2, *supra*), contends that the procedures followed in authorizing the intercepts were in substantial compliance with 18 U.S.C. § 2516(1). The government argues that Sol Lindenbaum "stands in a special relationship to the Attorney General which makes him, in effect, the alter ego of the Attorney General." Accordingly, the government reasons that Sol Lindenbaum's approval of the intercepts involved in this case is essentially that of the Attorney General and that there has been no undermining of the legislative intent of the statute since responsibility for the authorization of the intercepts can still be traced to an identifiable political figure, the Attorney General.

Alternatively, the government asserts that even should the Court find the procedures employed here to be violative of 18 U.S.C. § 2516(1), the violation is merely a "technical" one which should not warrant the application of the exclusionary rule.

III

1. *As to Intercepts 1(a), 1(b) and 3*

Having examined the affidavits filed by the government, and after hearing oral argument, the Court concludes that the procedures followed in authorizing intercepts 1(a), 1(b) and 3 clearly violated the terms of 18 U.S.C. § 2516(1); and the Court further determines that all evidence derived from these illegal intercepts must be suppressed under 18 U.S.C. § 2518 (10).

In so ruling, the Court adopts the reasoning and conclusions of the Fifth Circuit in *United States* v *Robinson*, —— F. 2d ——, No. 71-1058; (5th Cir.

filed January 12, 1972),[1] in which the Fifth Circuit was faced with the identical question we face here. After an examination in depth of the legislative history of Section 2516(1), the Court concluded that the procedures followed severely undercut the congressional purpose in fixing responsibility for the authorization of intercepts in "a publicly responsible official subject to the political process." *Robinson, supra*, Slip Op. at 5-6.

Several federal district courts have relied on *Robinson* to suppress evidence secured through intercepts which were subject to the same procedural defect in the authorization process as that involved here. *United States* v. *Cihal*, —— F. Supp. ——, Criminal No. 71-61 (W.D. Pa., filed January 13, 1972);[2] *United States* v. *Focarile*, —— Fed. Supp. ——, Crim. No. 70-0483-M (D. Md., filed Feb. 22, 1972); *United States* v. *Aquino*, —— Fed. Supp. ——, Crim. No. 28578 (E.D. Mich., filed Jan. 17, 1972).[3] *Aquino* extended *Robinson* one step and held that the authorization for the extension of a properly authorized intercept must also be free of the procedural defect struck down in *Robinson*.[4]

2. *As to Intercept No. 2*

The Court finds that the Attorney General personally approved the authorization of Intercept No.

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[1] Reported in 40 U.S.L.W. 2454.

[2] Reported in 10 Cr. L. Reporter at 2378.

[3] Reported in 10 Cr. L. Reporter at 2369.

[4] On information and belief, Judge Becker, E. D. Pa., has also followed *Robinson*. Washington Post, p. A4, March 25, 1972.

2 in a memo initialed by him, addressed to Will Wilson, and, therefore, concludes that there was substantial compliance with the statute notwithstanding that Will Wilson did not sign personally.

Nonetheless, the Court concludes that the evidence secured from this intercept must be suppressed under the "fruit of the poisonous tree" doctrine since the affidavit in support of the application for this intercept is based almost entirely upon information obtained from intercepts 1(a) and 1(b) which this Court has found to be in violation of 18 U.S.C. § 2516 (1). *United States* v. *Iannelli*, —— Fed. Supp. —— (W.D. Pa., filed Feb. 16, 1972).[5]

Accordingly, it is by the Court this 29th day of March, 1972, ORDERED that the motions to suppress the contents of intercepts 1(a), 1(b), 2, and 3 and any evidence derived therefrom are granted.

/s/ H. F. Corcoran
Judge

[5] Reported in 10 C.R.L. Reporter at 2435.

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